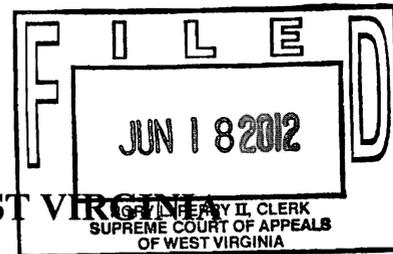


12-0737



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12----

**STATE OF WEST VIRGINIA ex rel.
ADVANCE STORES COMPANY, INCORPORATED,
dba ADVANCE AUTO PARTS, and DONN FREE, Petitioners**

vs.

**HONORABLE ARTHUR M. RECHT, Senior Status Judge of the Circuit Court of
Ohio County; SCOTT MCMAHON and KAREN JOHN, individually and on behalf of
others similarly situated, Respondents**

VERIFIED PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioners

Ancil G. Ramey, Esq.
WV State Bar No. 3013
Karen E. Kahle, Esq.
WV State Bar No. 5582
Hannah Curry Ramey, Esq.
WV State Bar No. 7700
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133
ancil.ramey@steptoe-johnson.com

Counsel for Respondents

Joseph J. John, Esq.
WV State Bar No. 5208
John Law Offices
80 12th Street, Suite 200
Wheeling, WV 26003-3273
Telephone (304) 233-4380
johnlawwv@aol.com

Anthony I. Werner, Esq.
WV State Bar No. 5203
Bachmann Hess Bachman & Garden
P.O. Box 351
Wheeling, WV 26003
Telephone (304) 233-3511
awerner@bhbgllaw.com

TABLE OF CONTENTS

I. QUESTION PRESENTED..... 1

II. STATEMENT OF THE CASE 2

III. SUMMARY OF ARGUMENT 9

IV. STATEMENT REGARDING ORAL ARGUMENT 10

V. ARGUMENT

 A. AN ORDER ALLOWING PLAINTIFFS TO LITIGATE CLAIMS THAT ARE UNTIMELY; STATE NO CAUSE OF ACTION; AND/OR ARE PROHIBITED BY THIS COURT’S PREVIOUS OPINION AND MANDAGE IN MCMAHON I IS PROPERLY THE SUBJECT OF INTERLOCUTORY APPELLATE REVIEW BY WRIT OF PROHIBITION 10

 B. THE CIRCUIT COURT’S ORDER ALLOWING PLAINTIFFS TO LITIGATE CAUSES OF ACTION OTHER THAN THE ONLY REMAINING PURPORTED IMPLIED WARRANTY OF MERCHANTABILITY CLAIM IS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION 12

 C. THE CIRCUIT COURT’S ORDER ALLOWING PLAINTIFFS TO RELITIGATE EXPRESS WARRANTY, CONSUMER PROTECTION, AND RELATED CLAIMS IS THE PROPER SUBJECT OF A WRIT OF PROHIBITION

 1. Plaintiffs’ Express Warranty and Consumer Protection Claims Are Barred by *Res Judicata* 17

 2. Plaintiffs’ Third Amended Complaint States No Cause Of Action for Fraud or Unjust Enrichment 19

 D. THE CIRCUIT COURT’S ORDER ALLOWING PLAINTIFF JOHN TO LITIGATE A NEW MAGNUSON-MOSS CLAIM IS THE PROPER SUBJECT OF A PETITION FOR WRIT OF PROHIBITION

 1. Plaintiff John’s Magnuson-Moss Claim is Time-Barred Because New “Claims” Do Not “Relate Back” Under Rule 15 20

 2. Because Plaintiff John Has No Standing as a “Consumer,” She Has No Standing under Magnuson-Moss 24

3. A Sales Receipt Referring a Consumer to His or Her Express Warranty in Another Document is not a “Warranty” Under Magnuson-Moss25

4. Because Plaintiff John Has No State Law Written Express Warranty Claim, She Has No Claim under Magnuson-Moss30

VI. CONCLUSION32

TABLE OF AUTHORITIES

CASES

| | |
|--|--------|
| <u>Baldwin v. Jarrett Bay Yacht Sales, LLC,</u> 683 F. Supp. 2d 385, 391 (E.D.N.C. 2009) | 31 |
| <u>Birdsong v. Apple, Inc.,</u> 590 F.3d 955 (9 th Cir. 2009) | 30 |
| <u>Brown v. Cincyautos, Inc.,</u> 2009 WL 2913936 (S.D. Ohio) | 31 |
| <u>Cerasani v. Am. Honda Motor Co.,</u> 916 So. 2d 843, 846 (Fla. Ct. App. 2005)..... | 24-25 |
| <u>Clemens v. DaimlerChrysler Corp.,</u> 534 F.3d 1017 (9th Cir. 2008) | 31 |
| <u>Daugherty v. Am. Honda Motor Co., Inc.,</u> 144 Cal. App. 4th 824, 51 Cal. Rptr. 3d 118 (2006) | 31 |
| <u>Dawson v. Canteen Corp.,</u> 158 W.Va. 516, 212 S.E.2d 82 (1975) | passim |
| <u>Dzinglski v. Weirton Steel Corp.,</u> 191 W. Va. 278, 445 S.E.2d 219 (1994) | 21 |
| <u>Highway Sales, Inc. v. Blue Bird Corp.,</u> 559 F.3d 782 (8 th Cir. 2009) | 20 |
| <u>Home Depot U.S.A., Inc. v. Miller,</u> 268 Ga. App. 742, 603 S.E.2d. 82 (2004) | 27-28 |
| <u>In re Eagle-Picher Industries, Inc.,</u> 181 B.R. 51 (Bankr. S.D. Ohio 1995) | 5 |
| <u>Kelley v. Microsoft Corp.,</u> 2007 WL 2600841 (W.D. Wash.)..... | 27 |
| <u>McFoy v. Amerigas, Inc.,</u> 170 W. Va. 526, 295 S.E.2d 16 (1982) | 13 |
| <u>Mauck v. City of Martinsburg,</u> 178 W. Va. 93, 357 S.E.2d 775 (1987) | 23 |

| | |
|--|-----------|
| <u>McMahon v. Advance Stores Co.,</u> 227 W. Va. 21, 705 S.E.2d 131 (2010) | passim |
| <u>Mesa v. BMW of North America,</u> 904 So. 2d 450 (Fla. Ct. App.2005)..... | 24 |
| <u>Monticello v. Winnebago Indus. Inc.,</u> 369 F. Supp. 2d 1350 (N.D. Ga. 2005)..... | 31 |
| <u>NEC Technologies, Inc. v. Nelson,</u> 267 Ga. 390, 478 S.E.2d 769 (1996) | 28 |
| <u>Rentas v. DaimlerChrysler Corp.,</u> 936 So.2d 747 (Fla. Ct. App. 2006)..... | 24 |
| <u>Sewell v. Gregory,</u> 371 S.E.2d 82, 179 W.Va. 585 (1975) | 6, 7 |
| <u>Skelton v. General Motors Corp.,</u> 500 F. Supp. 1181, 1185 n.8 (D. Ill. 1980)..... | 25 |
| <u>Skelton v. General Motors Corp.,</u> 660 F.2d 311 (7th Cir. 1981) | 28-29 |
| <u>State ex rel. Amy M. v. Kaufman,</u> 196 W. Va. 251, 470 S.E.2d 205 (1996) | 11 |
| <u>State ex rel. Frazier & Oxley, L.C. v. Cummings,</u> 214 W. Va. 802, 591 S.E.2d 728 (2003) | 12, 14-16 |
| <u>State ex rel. Hoover v. Berger,</u> 199 W. Va. 12, 483 S.E.2d 12 (1996) | 11 |
| <u>State ex rel. Kaufman v. Zakaib,</u> 207 W. Va. 662, 535 S.E.2d 727 (2000) | 13 |
| <u>State ex rel. Packard v. Perry,</u> 221 W. Va. 526, 655 S.E.2d 548 (2007) | 11-12 |
| <u>Thomas v. Micro Ctr.,</u> 172 Ohio App. 3d 381, 875 N.E.2d 108 (2007) | 27 |

STATUTES and REGULATIONS

| | |
|-----------------------------------|---|
| W. Va. Code § 46-2-719(1)(a)..... | 4 |
|-----------------------------------|---|

| | |
|---------------------------------|--------|
| W. Va. Code § 46-2-725(1)..... | 20 |
| W. Va. Code § 46A-6-108(a)..... | 8, 16 |
| W. Va. Code § 53-1-1..... | 10 |
| 15 U.S.C. § 2301 | passim |
| 16 C.F.R. § 239.4..... | 27 |
| 16 C.F.R. § 700.6..... | 27 |
| 16 C.F.R. § 701.1. | 27 |
| 40 C.F.R. § 85.2102..... | 27 |

RULES

| | |
|-------------------------|----|
| R. App. P. 20 | 12 |
|-------------------------|----|

SECONDARY SOURCES

| | |
|--|-----------|
| F. Cleckley, R. Davis & L. Palmer, <u>Litigation Handbook 4th</u> , § 8(c)[2][c][ii] | 18 |
| F. Cleckley, R. Davis & L. Palmer, <u>Litigation Handbook 4th</u> , § 15(c)(2)[2]. | 20, 22-23 |

I. QUESTION PRESENTED

This is a verified petition for writ of prohibition by defendants, Advance Stores Company, Incorporated, dba Advance Auto Parts [“Advance”], and Don Free, from an order entered on April 5, 2012, which is contrary to this Court’s opinion and mandate in McMahon v. Advance Stores Co., 227 W. Va. 21, 705 S.E.2d 131 (2010) (“McMahon I”).¹

In McMahon I, this Court held that the only express warranty in this case expired by its own terms when the vehicle in which a battery was installed was sold by the purchaser of the battery to a third-party. Upon remand, however, the Circuit Court essentially overruled this Court and held that the receipt provided to the purchaser, which expressly referenced the warranty this Court determined had expired, may constitute an express warranty, and that a number of new claims may be asserted by plaintiffs based upon that contention.

Accordingly, the question presented is whether the Circuit Court’s order which allows plaintiffs to pursue claims predicated upon the existence of an express warranty this Court held expired should be prohibited.

II. STATEMENT OF THE CASE

In McMahon I, this Court held as follows:

1. The subsequent purchaser of a used car into which the battery had been placed was not a “consumer” within the meaning

¹ Circuit Court’s Memorandum and Order, App. at 1-28. In granting, in part, the defendants’ motion to dismiss, the Circuit Court correctly held that Mr. McMahon has no standing to assert an implied warranty or Magnuson-Moss claim against Advance. App. at 12 and 23. With respect to a passing reference to the implied warranty of fitness for a particular purpose in plaintiffs’ response briefing, the Circuit Court also correctly concluded that “such a claim does not appear in the Third Complaint, and the Court is aware of no evidence the battery was used or intended to be used for an extraordinary purpose. No such claim is before the Court”. App. at 15, fn. 7. Therefore, these issues will not be addressed in this petition.

of the Consumer Credit and Protection Act with respect to the battery;

2. W. Va. Code § 46A-6-108(a) does not apply to suits for breach of a limited express warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers; and

3. The battery's limited express warranty ceased to exist when the original purchaser sold the battery, where the warranty by its express terms limited availability of the remedy to the original purchaser who held the original transactional receipt.

Regarding the factual and procedural background underlying its decision, this Court explained:

This certified question arises from the respondent Scott McMahon's purchase of a new Autocraft car battery from the petitioner Advance Stores Company Incorporated, d/b/a Advance Auto Parts (hereinafter referred to as Advance). Mr. McMahon purchased the battery from the Advance store in Weirton, West Virginia, on or about March 2, 2004. McMahon received a receipt from his purchase that indicated that the battery cost approximately \$49. Indicated on the receipt was an acknowledgment of an express warranty between Advance and the purchaser. Printed on the receipt was the statement "24 month free replacement, 72 month pro-rated." At the bottom of the receipt was a statement directing the purchaser to Advance's website [www.advanceautoparts.com] where the limited express warranty information was available. This limited warranty information was also available to the purchaser at the store. The receipt also noted that the receipt was required for all returns. Advance's express warranty, stated, in pertinent part, as follows:

Advance Auto Parts Limited Warranty Policy

BATTERIES

OUR GUARANTEE

We will replace any battery we sell, should it fail due to defects in materials or workmanship, under normal installation, use, and service, while under warranty. This warranty does not cover the

exceptions listed below under "WHAT IS NOT COVERED."

LENGTH OF WARRANTY

Your warranty begins the day you purchase the battery, and expires at the end of the warranty period printed on your original receipt, or when you sell your vehicle, whichever comes first.

FREE REPLACEMENT PERIODS

Your free replacement period begins the day you purchase the battery, and expires at the end of the "Free Replacement Period" printed on your original receipt, or when you sell your vehicle, whichever occurs first.

* * *

WHAT IS NOT COVERED

This warranty does not cover: failure due to misuse, abuse, modification, accident or collision, or improper installation. THIS WARRANTY DOES NOT COVER INCIDENTAL OR CONSEQUENTIAL DAMAGES SUCH AS PHYSICAL INJURIES, PROPERTY DAMAGE, LOSS OF TIME, *23 **133 LOSS OF USE OF THE VEHICLE, INCONVENIENCE, RENTAL VEHICLE, TOWING CHARGES, OR ACCOMMODATIONS RESULTING FROM THE FAILURE OF THE BATTERY.

WHAT YOU MUST DO

You must take the defective battery and the purchase receipt therefore, to an Advance Auto Parts store during normal business hours. If "proration" applies and Advance Auto Parts does not refund the prorated purchase price, you must pay the difference between the cost of a new battery and the amount of the proration when you receive your new battery, plus any taxes.

LEGAL

This limited warranty represents the total liability of Advance Auto Parts for any part it warrants. Advance Auto Parts makes no other warranties expressed or implied, including the warranties of merchantability and fitness for a particular purpose. Some states do not allow limitations on how long an implied warranty lasts, so the above information may not apply to you. This warranty gives you specific rights and you may have other rights, which vary from state to state. Advance Auto Parts does not authorize any person to vary the terms, conditions, or exclusions of this warranty.²

In September of 2004, after the purchase of this battery but within the 24-month time period during which the battery could be replaced under the express warranty, McMahan sold the Jeep into which the Advance battery had been placed. The purchaser of the Jeep was Karen John. In January, 2005, the Advance battery quit working, and on January 20, 2005, John's husband, Joseph, and the respondent Karen John, went to an Advance store to inquire about the warranty on the battery. At this time they were told that nothing could be done under the warranty without a receipt. They then purchased a new Autocraft battery on that day. McMahan later provided the original receipt to Karen John, who passed it along to her husband who presented it to Advance on February 8, 2005, for action on the express warranty. The petitioner, Donn Free, the manager of the Advance Auto Parts store, advised John that because he was not the original purchaser of the battery, he was not entitled to relief under the limited express warranty.³ McMahan then reimbursed John for the cost of the battery.⁴

² Advance Auto Parts Limited Warranty Policy, App. at 190-191.

³ After securing the original receipt, Mr. John took the defective battery to Advance Auto Parts, but requested a refund rather than a replacement. Of course, even if Mr. John had been the original purchaser, he would not have been entitled to a refund, but only a replacement battery. W. Va. Code § 46-2-719(1)(a), expressly provides, “the agreement may provide for remedies in addition to or in substitution for those provided in this article and *may limit or alter the measure of damages recoverable under this article, as by limiting the buyer’s remedies* to return of the goods and repayment of the price or to *repair and replacement of nonconforming goods or parts*” (emphasis supplied). Pursuant to this UCC provision, battery manufacturers and dealers limit their warranties to “repair or replacement.” See In re Eagle-Picher Industries, Inc., 181 B.R. 51, 53 (Bankr. S.D. Ohio 1995) (“Our obligation under this warranty *shall be limited to the repair or replacement*, FOB factory, *of any CAREFREE battery* which is returned as a

Not satisfied with Advance's response to his request, McMahon instituted suit against Advance and Donn Free, the employee with whom McMahon and John dealt on the refund issues.⁵ McMahon sued the petitioners for their failure to honor the express limited warranty. In a four-count complaint, McMahon alleged that the petitioners had breached the express warranty by failing to replace the battery; had breached the implied warranty of merchantability; had engaged in fraud by never telling McMahon that the limited express warranty applied only to the original purchaser; and had violated West Virginia consumer protection laws. McMahon sought damages for annoyance, inconvenience and aggravation; replacement cost of the battery and expenses incurred in attempting to have the warranty honored; attorney fees and litigations expenses; damages allowed by the Consumer Protection Act; and incidental and consequential damages. A jury trial was requested.

After the filing of the complaint, McMahon sought to amend his complaint and to certify the action as a class action.⁶ The complaint was then amended to include Karen John as a named plaintiff.⁷ At one point the case was removed to the United States District Court for the Northern District of West Virginia but was remanded to state court. Discovery ensued and the parties filed various motions and pleadings throughout the proceedings. The respondents filed a motion for summary judgment, requesting “this court to test the policy of the Defendant, Advance Stores

complete unit to the factory within the 1 year warranty period, transportation charges prepaid, and which proves to our satisfaction, upon examination, to be defective.”) (emphasis supplied).

⁴ Although, at that point, *the Johns had been fully compensated*, Ms. John nevertheless filed suit with Mr. McMahon, seeking compensatory damages, punitive damages, and attorney fees because Advance Auto Parts refused to give Mr. John a \$49.94 refund. See Second Amended Complaint, App. at 52-65.

⁵ See Complaint, App. at 29-37.

⁶ See Amended Complaint, App. at 38-51.

⁷ See Second Amended Complaint, App. at 52-65. After Advance filed a motion to dismiss challenging Mr. McMahon’s standing to sue, Mr. McMahon twice amended the complaint ultimately naming Mr. McMahon and Ms. John, individually and on behalf of others similarly situated, seeking to certify a class of all Advance Auto Parts customers who have been denied battery refunds or replacements because they were not the original purchasers. *Id.* Eventually, Mr. McMahon and Ms. John filed a motion for class certification.

Company, Inc., d/b/a Advance Auto Parts (hereinafter Advance), relating to warranties attached to the sale of its motor vehicle batteries.” On February 20, 2008, the circuit court granted partial summary judgment to the respondents, stating, *inter alia*:

West Virginia has abolished the concept of both vertical and horizontal privity in a series of cases with the seminal opinions being Dawson v. Canteen Corp., Syllabus 158 W.Va. 516, 212 S.E.2d 82 (1975), and Sewell v. Gregory, 371 S.E.2d 82, 179 W.Va. 585. (Footnote omitted).

Thus, independently of any statutory provisions, this Court has evolved the remedy of breach of implied warranty of fitness. Accordingly, Advance shall be required to abide by its warranty notwithstanding the person attempting to assert the warranty may not have been the original purchaser. The Plaintiffs' Motion for Summary Judgment is hereby granted.

227 W. Va. at 22-24, 705 S.E.2d at 132-134 (footnotes omitted).

Because it is clear from this Court’s decisions that Dawson and its progeny are limited to product liability cases for physical injury or property damage and do not allow breach of contract suits by persons who are not parties to the express warranty and because “purchaser only” express limited warranties are common throughout the United States for a wide variety of industrial and consumer products and have been upheld by other courts, this Court answered the question certified by the Circuit Court in the negative and remanded the case to the Circuit Court for further proceedings consistent with its opinion.

Indeed, this Court explained:

Karen John is not “a natural person to whom a sale or lease is made in a consumer transaction,” as it relates to the sale of the battery by the petitioners. *Karen John had no direct relationship to Advance in regard to the battery that ceased to operate in the car she purchased from Scott McMahon. As such, she did not participate in a consumer transaction with Advance relating to the purchase of the failed battery.*

With Karen John not being a “consumer,” we return to the language of the limited express warranty of Advance as it relates to Scott McMahon. The respondents contend that under our holdings in Dawson and its progeny, and the elimination of the notion of privity in express and implied warranties, there can be no limitations on Advance’s warranty. We disagree. As noted by the petitioner, limited express warranties are commonplace throughout the country, and have been upheld as they relate to sprinkler systems, fencing, bedding, and countless other products.

The respondents argue that Advance is not able under West Virginia law to limit the terms of an express warranty it chooses to extend to initial purchasers. If this were the case, what incentive does any retailer have in making any express warranty? The simple truth is that retailers do not have to provide express warranties for their products. They may sell their wares without them, forcing the consumer to rely only upon those implied warranties created by statute or our body of case law.

While our holding in Dawson would appear, at first glance, to apply to all express or implied warranties, we believe that the application of the Dawson holding should be limited to actions that are essentially product liability claims, consistent with the facts then before this Court. Nothing in Dawson or its progeny suggests that our holding in Dawson should extend to the \$49 consumer transaction between Advance and Mr. McMahon or the subsequent motor vehicle transaction between Mr. McMahon and Ms. John. To expand Dawson to Advance’s limited express warranty herein would essentially have this Court rewrite the stated limitation of the warranty itself and thereby rendering the bargained-for limitations by the parties meaningless.

We hold that W. Va. Code § 46A-6-108(a) does not apply to suits for breach of a limited express warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers. *Because it is permissible for a retailer to create a limited express warranty, the conclusion reached in this case must be guided by the words of the limited express warranty of Advance. The limited express warranty clearly and unambiguously spelled out a specific time during which the battery would be warranted by Advance, as well as the appropriate remedy available to the purchaser seeking action under the warranty. The limited express warranty also clearly and unambiguously limited the availability of the remedy to the original purchaser who held the original transactional receipt. At*

the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist.

227 W. Va. at 26-27, 705 S.E.2d at 136-37 (emphasis added) (footnotes omitted).

After plaintiffs lost before this Court regarding their express warranty, consumer protection, and other related claims, the case was remanded for litigation on the only purported remaining claim: breach of implied warranty of merchantability.

On February 11, 2011, however, the Circuit Court granted plaintiffs leave to file and serve a third amended complaint. Essentially, the only change from the prior complaints in this action was the addition of Count 6 asserting a new cause of action based upon the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C. § 2301, *et seq.*⁸

Otherwise, the third amended complaint asserted the same causes of action, including ones this Court expressly held in McMahon I were precluded, as were asserted in the original complaint: Count 1 for breach of express warranty by failing to honor the express warranty and replace the battery; Count 2 for breach of implied warranty of merchantability by failing to replace a battery that “[became] defective within a 10 month period;” Count 3 for fraud by not telling Mr. McMahon that the express warranty applied only to the original purchaser; Count 4 for violation of West Virginia consumer protection laws by failing to honor the express warranty and replace the battery; and Count 5 for unjust enrichment by failing to honor the express warranty and replace the battery.

On April 5, 2012, the Circuit Court entered an order denying, in part, the defendants’ motion to dismiss, allowing (1) plaintiffs to proceed on a new theory of recovery that the sales receipt provided with the purchase of the subject car battery constitutes a separate written

⁸ See Third Amended Complaint, App. at 83-93.

warranty from the limited express warranty (*plainly contrary to this Court's holding in McMahon I that the express warranty appeared on Advance Auto's website and expired upon Mr. McMahon's sale of the vehicle to Ms. John*); (2) both plaintiffs to relitigate Count 1 for breach of express warranty; Count 4 for violation of West Virginia consumer protection laws; and Count 5 for unjust enrichment by failing to honor the express warranty and replace the battery (*plainly contrary to this Court's holding in McMahon I that the express warranty appeared on Advance Auto's website and expired upon Mr. McMahon's sale of the vehicle to Ms. John*); (3) both plaintiffs to relitigate Count 3 for fraud by not telling Plaintiff McMahon on the receipt that the express warranty applied only to the original purchaser (*plainly contrary to this Court's holding in McMahon I that the express warranty appeared on Advance Auto's website and expired upon Mr. McMahon's sale of the vehicle to Ms. John*); and (4) Plaintiff John to litigate Count 6 for a new MMWA claim by failing to honor the express warranty on the receipt and replace the battery (*plainly contrary to this Court's holding in McMahon I that the express warranty appeared on Advance Auto's website and expired upon Mr. McMahon's sale of the vehicle to Ms. John*).⁹

In other words, plaintiffs have been permitted to proceed upon remand as if McMahon I and its holding that the express warranty that appeared on Advance Auto's website and expired upon the McMahon's sale of the vehicle to John never happened.

III. SUMMARY OF ARGUMENT

As if this Court never issued its opinion in McMahon I, plaintiffs seek to (1) relitigate their express warranty claim, including their argument (rejected by this Court) that original purchaser limited express warranties are illegal; (2) pursue a fraud claim attacking the very

⁹ Circuit Court's Memorandum and Order, App. at 1-28.

original purchaser limited express warranty validated by this Court; (3) pursue a consumer protection claim even though this Court expressly rejected their attack on original purchaser limited express warranties under the Consumer Credit and Protection Act; (4) pursue an unjust enrichment claim based upon Advance's enforcement of the original purchaser limited express warranty even though it was validated by this Court; and (5) initiate a new Magnuson-Moss claim, based upon the lone dissent of Justice Ketchum, in which no other Justice joined, even though (a) the statute of limitations under the Magnuson-Moss Act, which is three years, had expired; (b) amendment, pursuant to this Court's mandate, is precluded; and (c) there can be no cause of action under Magnuson-Moss if, as this Court has already ruled, there is no claim for express warranty under state law. Accordingly, defendants respectfully request that this Court issue a writ of prohibition in this matter prohibiting the Circuit Court from enforcing its order of April 5, 2012, and awarding defendants such other relief as the Court deems appropriate.

IV. STATEMENT REGARDING ORAL ARGUMENT

Because the Circuit Court has ignored this Court's previous opinion and mandate in McMahon I, defendants request oral argument in this matter pursuant to R. App. P. 20.

V. ARGUMENT

A. AN ORDER ALLOWING PLAINTIFFS TO LITIGATE CLAIMS THAT ARE UNTIMELY; STATE NO CAUSE OF ACTION; AND/OR ARE PROHIBITED BY THIS COURT'S PREVIOUS OPINION AND MANDATE IN MCMAHON I IS PROPERLY THE SUBJECT OF INTERLOCUTORY APPELLATE REVIEW BY WRIT OF PROHIBITION.

A "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1.

Prohibition may “be substituted for a writ of error or appeal when the latter alternatives would provide an inadequate remedy.” State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 257, 470 S.E.2d 205, 211 (1996) (citations omitted) (quoting State ex rel. Chafin v. Halbritter, 191 W. Va. 741, 743-44, 448 S.E.2d 428, 430-31 (1994)).

This Court’s “modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irreparable prejudice may result from lack of an adequate interlocutory review.” Amy M., 196 W. Va. at 257, 470 S.E.2d at 211 (quoting McFoy v. Amerigas, Inc., 170 W. Va. 526, 532, 295 S.E.2d 16, 22 (1982)); accord State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 667, 535 S.E.2d 727, 732 (2000) (citing Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973)).

This Court has identified five factors that will be examined by the Court in determining whether to grant a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.

Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Although all five factors need not be satisfied, “it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” State ex rel.

Packard v. Perry, 221 W. Va. 526, 532, 655 S.E.2d 548, 554 (2007). Applying these criteria, this Court has issued writs of prohibition where trial courts have failed to comply with this Court's directives upon remand.

In Syllabus Points 3, 4, and 5 of State ex rel. Frazier & Oxley, L.C. v. Cummings, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("Frazier & Oxley II"), this Court held:

3. Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

4. A circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed de novo.

5. When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate.

In this case, the Circuit Court has failed to implement either the letter or the spirit of this Court's mandate as it is allowing plaintiffs to proceed upon theories based upon the alleged existence and survival of an express warranty this Court has already ruled expired upon the sale of the vehicle. Consequently, issuance of a writ of prohibition is appropriate.

B. THE CIRCUIT COURT'S ORDER ALLOWING PLAINTIFFS TO LITIGATE CAUSES OF ACTION OTHER THAN THE ONLY REMAINING PURPORTED IMPLIED WARRANTY OF MERCHANTABILITY CLAIM IS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION.

Pursuant to this Court's holding McMahon I that the express warranty expired upon sale of the vehicle from Mr. McMahon to Ms. John, the only issue on remand was plaintiffs' purported implied warranty of merchantability claim. The certified question in this case arose from the parties' cross-motions for summary judgment. Plaintiffs' rested their entire case, other

than their implied warranty claim, on the theory that the Consumer Credit and Protection Act prohibited Advance from limiting its express warranty to the original purchaser. This Court disagreed and remanded the matter to the Circuit Court for further proceedings consistent with its opinion and extinguished all claims based upon the alleged existence of an express warranty.

Specifically, the Court held that (1) there could be no breach of express warranty as the warranty expired upon sale of the vehicle containing the battery; (2) there was no fraud as the express warranty automatically expired upon sale of the vehicle containing the battery; and (3) there was no violation of the Consumer Credit and Protection Act because original purchaser express warranties do not violate the Act:

With Karen John not being a “consumer,” we return to the language of the limited express warranty of Advance as it relates to Scott McMahon. The respondents contend that under our holdings in Dawson and its progeny, and the elimination of the notion of privity in express and implied warranties, there can be no limitations on Advance's warranty. We disagree. As noted by the petitioner, limited express warranties are commonplace throughout the country, and have been upheld as they relate to sprinkler systems, fencing, bedding and countless other products.

The respondents argue that Advance is not able under West Virginia law to limit the terms of an express warranty it chooses to extend to initial purchasers. If this were the case, what incentive does any retailer have in making any express warranty? The simple truth is that retailers do not have to provide express warranties for their products. They may sell their wares without them, forcing the consumer to rely only upon those implied warranties created by statute or our body of case law.

While our holding in Dawson would appear, at first glance, to apply to all express and implied warranties, we believe that the application of the Dawson holding should be limited to actions that are essentially product liability claims, consistent with the facts then before this Court. Nothing in Dawson or its progeny suggests that our holding in Dawson should extend to the \$49 consumer transaction between Advance and Mr. McMahon or the subsequent motor vehicle transaction between Mr. McMahon and Ms. John. *To expand Dawson to Advance's limited express warranty herein*

would essentially have this Court rewrite the stated limitation of the warranty itself and thereby rendering the bargained-for limitations by the parties meaningless.

We hold that W. Va. Code § 46A-6-108(a) does not apply to suits for breach of a limited express warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers. Because it is permissible for a retailer to create a limited express warranty, the conclusion reached in this case must be guided by the words of the limited express warranty of Advance. The limited express warranty clearly and unambiguously spelled out a specific time during which the battery would be warranted by Advance, as well as the appropriate remedy available to the purchaser seeking action under the warranty. The limited express warranty also clearly and unambiguously limited the availability of the remedy to the original purchaser who held the original transactional receipt. At the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist.

227 W. Va. at 26-27, 705 S.E.2d at 136-137. (Emphasis supplied and footnotes omitted).

Nevertheless, the Circuit Court allowed plaintiffs to retrench and assert claims in a third amended complaint for express warranty, implied warranty, Magnuson-Moss, fraud, unjust enrichment, and consumer protection violations based upon Advance's enforcement of the original purchaser limited express warranty, rendering irrelevant this Court's proceedings. This is simply prohibited under West Virginia law.

In Frazier & Oxley II, as in this case, plaintiff attempted to amend its cause of action after this Court remanded the case following interlocutory review. After the trial court permitted the amendment, this Court issued a writ of prohibition holding that, "When the opinion and mandate of this court prohibit relitigation of some issues on remand, or direct that only some expressly severed issues or causes may still be litigated, and the parties and trial court attempt relitigation beyond that which was expressly permitted, a writ of prohibition will issue to prohibit relitigation." *Id.* at 812-13, 591 S.E.2d at 738-39. Of course, this is precisely what plaintiffs are

attempting in this case, i.e., to insert new causes of action even though all that was left by this Court's remand was the claim of breach of the implied warranty of merchantability.

The Circuit Court concluded that the mandate in this case is somehow different than the mandate in Frazier & Oxley I, but the mandate in that case, App. at 183-184, is no different than the mandate issued in this case, App. at 66. In Frazier & Oxley I, the mandate stated, "this action is remanded to the Circuit Court of Cabell County for further proceedings in accordance with the written opinion. . . ." App. at 183. In this case, the mandate stated, "this matter is remanded to the Circuit Court of Ohio County for further proceedings consistent with this opinion." App. at 66. Thus, the question was what "further proceedings" are "in accordance" or "consistent with" the Supreme Court's "opinion"?

In Frazier & Oxley II, after describing plaintiff's legal theories that were extant at the time Frazier & Oxley I, the Court succinctly stated, "The circuit court's decision to allow St. James to amend its complaint to add a new theory of recovery based on the recording act exceeded the limited remand in Frazier & Oxley I." *supra* at 811, 591 S.E.2d at 737.

Likewise, it is clear from an examination of the opinion in this case and the plaintiffs' legal theories that were extant at the time of its issuance, it would violate this Court's mandate "to add a new theory of recovery." Indeed, this Court described plaintiffs' claims in this case as follows:

In a four-count complaint, McMahon alleged that the petitioners had breached the express warranty by failing to replace the battery; had breached the implied warranty of merchantability; had engaged in fraud by never telling McMahon that the limited express warranty applied only to the original purchaser; and had violated West Virginia consumer protection laws.

McMahon I, *supra* at 23, 705 S.E.2d at 133.

Thus, just as this Court had identified the extant causes of action in Frazier & Oxley I, it identified the extant causes of action in this case as (1) breach of express warranty; (2) breach of implied warranty; (3) fraud based upon breach of express warranty; and (4) breach of the Consumer Credit and Protection Act based upon breach of express warranty. Moreover, just as in Frazier & Oxley I, the Court disposed of all but one of the remaining causes of action, which was the only one to be litigated upon remand.

Plainly, although still included in plaintiffs' third amended complaint, there is nothing left of plaintiffs' express warranty claim as "[a]t the moment the original purchaser sold the battery," it "ceased to exist;" there is nothing left of plaintiffs' fraud claim as "[t]he limited express warranty clearly and unambiguously spelled out a specific time during which the battery would be warranted by Advance, as well as the appropriate remedy available to the purchaser seeking action under the warranty;" and there is nothing left of plaintiffs' Consumer Credit and Protection Act claim because of "Karen John not being a 'consumer.'"

Indeed, to allow plaintiffs to pursue a claim that the limited express warranty interpreted, applied, and upheld by this Court is somehow invalid under Manguson-Moss makes more of a mockery of its decision in this case than its original decision in Frazier & Oxley I. Likewise, plaintiffs are prohibited from attempting to resurrect their dead express warranty, consumer protection, fraud, and unjust enrichment claims. Accordingly, because it would violate this Court's mandate "to add a new theory of recovery" in this case just as in Frazier & Oxley II, the Circuit Court erred by allowing plaintiffs to litigate claims other than the remaining purported implied warranty of merchantability claim.

C. THE CIRCUIT COURT'S ORDER ALLOWING PLAINTIFFS TO RELITIGATE EXPRESS WARRANTY, CONSUMER PROTECTION, AND RELATED CLAIMS IS THE PROPER SUBJECT OF A WRIT OF PROHIBITION.

1. Plaintiffs' Express Warranty and Consumer Protection Claims Are Barred by *Res Judicata*.

Based upon the law of the case as expressed by this Court in its November 24, 2010, decision, these causes of action are *void ab initio*. Again, this Court held that the instant case does not involve a product liability claim wherein a person not in privity with a manufacturer or distributor sues the same for physical injury or property damage caused by the product; thus, Dawson and its progeny have absolutely no application in this case.

Rather, this Court essentially held that contract principles govern express warranties under the circumstances, and Ms. John had no cause of action for breach of a warranty to which she was not a party. Under the terms of the contract, Mr. McMahon had no cause of action for breach of a warranty which, by its own terms, expired when he sold his vehicle to Ms. John. There was no violation of the Consumer Credit and Protection Act because original purchaser express warranties do not violate the Act.

Moreover, Mr. McMahon sold the subject battery to Ms. John while it was functioning just fine and never made a claim under any express or implied warranty. Nor is there any language in the express warranty between Mr. McMahon and Advance that either expressly or impliedly declared an intent that the warranty was for Ms. John's or any other subsequent purchaser's sole benefit. Just the opposite--it specifically limited its availability to original purchasers.

The Circuit Court denied the defendants' motion to dismiss on grounds that "[plaintiffs] are not pursuing a claim based on the limited warranty, but one predicated on the terms of the sales receipt, which they contend constituted the only effective warranty governing the

transaction.” Circuit Court’s Memorandum and Order at 10, App. at 10. *In addition to lack of standing (based upon lack of privity and/or actual injury)*, plaintiffs are not permitted to relitigate their express warranty and consumer protection claims under the doctrine of *res judicata*.

“First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.” F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK 4TH at § 8(c)[2][c][ii] (2012)(footnote omitted) (“LITIGATION HANDBOOK”). Here, this Court had jurisdiction and determined that “At the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist.”

“Second, the two actions must involve either the same parties or persons in privity with those same parties.” *Id.* (footnote omitted). Here, the parties are identical.

“Third, the cause of action identified for resolution in the subsequent proceeding must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” *Id.* Obviously, whatever spin plaintiffs now wish to place on their express warranty claim in order to have saved it is either identical to what they had asserted prior to this Court’s proceedings or certainly “could have been resolved, had it been presented, in the prior action.”

In this case, the mandate stated, “this matter is remanded to the Circuit Court of Ohio County for further proceedings consistent with this opinion.” App. at 66. Defendants cannot conceive how any good faith argument can be made in the face of this Court’s opinion that plaintiffs can continue to litigate their breach of express warranty and consumer protection claims and that such proceedings would be “consistent with this opinion.” Plaintiffs filed for

summary judgment on these claims based upon a theory rejected by this Court and consequently, such claims should have been dismissed.

2. Plaintiffs' Third Amended Complaint States No Cause Of Action for Fraud or Unjust Enrichment.

Plaintiffs' sole defense of their fraud and unjust enrichment claims states: "For defendants to bait a sale based on the warranty and then take it away through terms and provisions that can be found later, if they ever existed, only in the internet, is nothing short of an intentional attempt to defraud customers and make an undue profit." App. at 128.

Obviously, in light of this Court's holding that the express warranty expired, by its terms, when Mr. McMahon sold his vehicle to Ms. John, there can be no cause of action for fraud or unjust enrichment based upon breach of a warranty that did not exist.

Moreover, plaintiffs cited no authority and defendants can conceive of none for the proposition that breach of an implied warranty of merchantability can also serve as the basis for a cause of action for fraud or unjust enrichment.

The absurdity of plaintiffs' fraud and unjust enrichment claims and, indeed, their entire case, is illustrated by merely looking at the receipt and written warranty provided. The receipt, App. at 188, plainly states at the bottom: "Visit us at www.advanceautoparts.com. RECEIPT REQUIRED FOR RETURNS. WARRANTY INFORMATION AVAILABLE." Likewise, the warranty, restated in McMahon I as well as attached in the Appendix at 190 to 191, expressly states, "Your warranty begins the day you purchase the battery and expires . . . when you sell your vehicle"

No reasonable consumer, as this Court ruled, could have been defrauded by a receipt which expressly referred the consumer to the seller's website for warranty information or by

such a clear statement of the scope of the express limited warranty. Accordingly, plaintiffs' fraud and unjust enrichment claims in the third amended complaint should have been dismissed.

D. THE CIRCUIT COURT'S ORDER ALLOWING PLAINTIFF JOHN TO LITIGATE A NEW MAGNUSON-MOSS CLAIM IS THE PROPER SUBJECT OF A PETITION FOR WRIT OF PROHIBITION.¹⁰

1. Plaintiff John's Magnuson-Moss Claim is Time-Barred Because New "Claims" Do Not "Relate Back" Under Rule 15.

The statute of limitations under the Magnuson-Moss Warranty Act in West Virginia is four years, see Highway Sales, Inc. v. Blue Bird Corp., 559 F.3d 782, 789 n.6 (8th Cir. 2009) ("because the Magnuson-Moss Warranty Act does not contain a statute of limitations, courts borrow the most closely analogous state statute of limitations, which is the statute of limitations found in the U.C.C.") and W. Va. Code § 46-2-725(1) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . ."). It expired in or about January/February 2009.

Because the factual predicate for plaintiffs' belated Magnuson-Moss claim, i.e., use of a "receipt warranty" referencing more details on a seller's website, was not the factual predicate for any of plaintiffs' other claims, the plaintiffs' third amended complaint does not "relate back" for purposes of R. Civ. P. 15. See LITIGATION HANDBOOK at § 15(c)(2)[2].

¹⁰ As already mentioned, the Circuit Court correctly held that Mr. McMahon has no standing to assert a Magnuson-Moss claim against Advance. App. at 23, fn. 15. ("Obviously, as Defendants' contend, Plaintiff McMahon has no standing to sue under Magnuson-Moss for the same reason he cannot sue for a breach of the implied warranty of merchantability – he has suffered no concrete injury in fact as a cause of any alleged breach of warranty. Consequently, Defendants' Motion to Dismiss with respect to Count VI, as it pertains to Plaintiff McMahon, should be **GRANTED**.") As defendants also argued below, Mr. McMahon does not meet the definition of "consumer" because he is not enforcing any right as a "buyer" and this Court has already determined that the express warranty expired immediately upon his sale of the vehicle to Ms. John. Mr. McMahon did not own the battery at the time it failed. Mr. McMahon did not make a claim under any express or implied warranty. Mr. McMahon's express and implied warranties expired, by operation of law, upon the sale of the vehicle to Ms. John.

In Syllabus Point 7 of Dzingski v. Weirton Steel Corp., 191 W. Va. 278, 445 S.E.2d 219 (1994), this Court held, “Pursuant to Rule 15, W. Va. R.C.P., amendments relate back when the cause of action sought to be added grows out of the specified conduct of the defendant that gave rise to the original cause of action. If, however, *the supplemental pleading creates an entirely new cause of action based on facts different from those in the original complaint, the amended pleading will not relate back for statute of limitations purposes.*” (emphasis supplied).

Although plaintiffs summarily asserted, and the Circuit Court agreed, that their third amended complaint arises out of the conduct, transaction, or occurrence which formed the basis of the original complaint, their own example undermines the argument. App. at 115. Specifically, their third amended complaint’s Magnuson-Moss claim is contained in Count VI and none of its allegations were contained in the original complaint (or the amended or second amended complaints). Compare Complaint, App. at 29-37, and Third Amended Complaint, App. at 83-93.

The original complaint, as plaintiffs themselves described in their response to defendants’ motion to dismiss the third amended complaint, was encapsulated in paragraph 8 which stated, “As part of the sale, the defendant provided an express warranty to cover the battery, which consisted of ’24 month free replacement, 72 month pro-rated.” App. at 115. The gravamen of plaintiffs’ suit, rejected by this Court, was that Advance breached that express warranty by denying a claim by Ms. John, a subsequent purchaser.

The third amended complaint, however, is not predicated upon breach of express warranty, but is based upon an allegation that the sales receipt was a warranty and, therefore, it did not comply with Magnuson-Moss:

49. The sales receipt given to plaintiff Scott McMahon at the time of defendant Advance Auto Parts’ sale of the battery to him

contains a “written warranty,” as defined and encompassed by the Magnuson-Moss Warranty Act. . . .

53. Under the Magnuson-Moss Act, the terms of any written warranty must be fully and conspicuously disclosed in a single document.

54. Under the Magnuson-Moss Act, written warranty information must be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

55. Defendant Advance Auto Parts’ refusal to provide any remedy to either plaintiff under its warranty is based upon purported warranty terms and conditions which were not made available to plaintiff Scott McMahon in compliance with the Magnuson-Moss Warranty Act.

App. at 89-90.

Here, not only is the cause of action not identical – it is predicated upon a federal statute, not an express or implied warranty – the core facts are not identical. Plaintiffs’ original complaint and, indeed, the certified question, focused on whether the express warranty’s limitation to original purchasers was valid or violated West Virginia law. Plaintiffs’ third amended complaint focuses on whether any limitation to original purchasers exists because it was not set forth on a sales receipt in alleged violation of Magnuson-Moss. Obviously, this is an entirely new cause of action based upon an entirely new core set of facts.

It has been observed that, “The relation back provision will only apply when no new or distinct conduct, transactions, or occurrences are alleged as . . . grounds for recovery. An amended pleading alleging a new claim or different facts or transactions not alleged in the original complaint will not relate back and will be time barred if the limitations period has expired.” LITIGATION HANDBOOK at § 15(c)(2)[2] (2008)(footnotes omitted). The test is

“whether the opposing party has had fair notice of the general factual situation *and legal theory upon which the amending party proceeds.*” Id. (emphasis supplied and footnote omitted).

Obviously, plaintiffs failed this test because but for Justice Ketchum’s dissenting opinion, issued years after this suit was filed, there was never any mention of Magnuson-Moss or an argument, independent of the Consumer Credit and Protection Act, that the warranty’s limitation to original purchasers was invalid because it violated Magnuson-Moss.

Application of the relation back rule is particular inappropriate when the amendment occurred after plaintiffs lost in the Supreme Court.

In Mauck v. City of Martinsburg, 178 W. Va. 93, 357 S.E.2d 775 (1987), as in this case, plaintiff lost an appeal to the Supreme Court of Appeals. Upon remand, plaintiff amended his complaint to assert an additional cause of action not asserted in his original suit. Reversing an order allowing plaintiff to amend his complaint and to allow the new claim to relate back to the filing of the original suit, the Court explained its decision by noting, “The liberality allowed in the amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time This is especially true where the party is seeking leave to amend on remand after an adverse ruling by an appellate court on his original pleadings.” Id. at 95, 357 S.E.2d at 777.

Of course, that is precisely what has occurred in this case, i.e., plaintiffs have amended their complaint to assert an entirely new cause of action “after an adverse ruling by an appellate court” on their original pleadings. Accordingly, plaintiffs do not satisfy the test for the relation back rule and their Magnuson-Moss claim should have been dismissed as barred by the statute of limitations.

2. Because Plaintiff John Has No Standing as a “Consumer,” She Has No Standing under Magnuson-Moss.

As this Court noted, “With Karen John not being a ‘consumer,’ we return to the language of the limited express warranty of Advance as it relates to Scott McMahon.” 227 W. Va. at 26, 705 S.E.2d at 136. This rationale also applies to any Magnuson-Moss claim by Ms. John.

The term “consumer” is defined under Magnuson-Moss as “*a buyer* (other than for purposes of resale) of any consumer product, *any person to whom such product is transferred during the duration of an implied or written warranty* (or service contract) applicable to the product, and *any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).*” 15 U.S.C. § 2301(3) (emphasis supplied).

Here, Ms. John does not meet this definition of “consumer” because she was not a “buyer;” this Court has already ruled that the express warranty expired upon sale of the vehicle to Ms. John and, thus, there was nothing to “transfer;” and this Court has already ruled that, for that reason, Ms. John has no cause of action for breach of express warranty or under the Consumer Credit and Protection Act.

Accordingly, Ms. John simply lacks standing to maintain an action under Magnuson-Moss. See Mesa v. BMW of North America, 904 So. 2d 450, 458 (Fla. Ct. App.2005)(holding plaintiff “cannot maintain suit against BMW for breach of implied warranty under Magnuson-Moss as there was no privity of contract between [plaintiff] and BMW”); Rentas v. DaimlerChrysler Corp., 936 So.2d 747 (Fla. Ct. App. 2006)(holding purchasers of a used car could not pursue an implied warranty claim under Magnuson-Moss because there was no privity of contract); Cerasani v. Am. Honda Motor Co., 916 So. 2d 843, 846 (Fla. Ct. App.

2005)(holding that subsequent purchaser could not assert claim under Magnuson-Moss for implied warranty because complaint did not allege privity).

Also, Magnuson-Moss' warranty provisions only apply to "point of sale" transactions and Ms. John was not involved in the point of sale. Accordingly, she has no standing to sue under the Act. See Skelton v. General Motors Corp., 500 F. Supp. 1181, 1185 n.8 (D. Ill. 1980)("The representations would also have to be made 'in connection with the sale' and would have to become 'part of the basis of the bargain' to constitute a written warranty under this section of the statute. 15 U.S.C. 2301(6). See Schroeder, supra n.4, at 14-16.").

The purpose of the warranty provisions of Magnuson-Moss are to ensure that consumers are not deceived with respect to their warranty rights at the point of sale. Here, of course, Ms. John could not have been deceived with respect to information concerning the battery's warranty at the point of sale because she was not present at the point of sale. For that reason, neither plaintiffs nor the Circuit Court have cited a single case in which anyone, under these circumstances, has been permitted to sue under Magnuson-Moss. Accordingly, plaintiffs' third amended complaint states no cause of action for Ms. John under Magnuson-Moss.

3. A Sales Receipt Referring a Consumer to His or Her Express Warranty in another Document is not a "Warranty" Under Magnuson-Moss.

It is absurd for plaintiffs to claim that a sales receipt is a "warranty" under Magnuson-Moss even though that sales receipt refers the consumer to the actual express warranty because dozens if not hundreds of sellers issue such receipts in West Virginia everyday.

Contrary to federal statutory language and numerous decisions indicating that the subject receipt does not satisfy the statutory criteria to constitute a "warranty" under the MMWA, the Circuit Court concluded that "This Court is unwilling to declare unilaterally and without clear

authority that a receipt indicating ‘24 MO. FREE REPL 72 MO. PRO’ is not sufficiently definite enough to constitute a warranty under Magnuson Moss, as this expression, at least in the context of the instant consumer transaction, clearly could indicate to a reasonable person that if the battery fails within 24 months, it will be replaced for free.” App. at 24-25.

The term “warranty” is defined under Magnuson-Moss as “any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time” or “any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.” 15 U.S.C. § 2301(6).

The statement on the receipt, “24 month free replacement, 72 month pro-rated,” clearly meets neither of these definitions as (a) it made no promise as to the material or workmanship of the battery; (b) it made no promise that the battery was defect free; (c) it made no promise that the battery would meet a specified level of performance over a specified period of time; and (d) it made no promise as to any refund, repair, replacement, or other remedial action in the event that the battery failed to meet any specifications and, indeed, no specifications appeared on the receipt.” Rather, the sole purpose of the receipt was to reference the express limited warranty on Advance’s website which provided all of that information and fully complied with federal law.

Moreover, the term “face of the warranty” is defined under the regulations as “(1) Where the warranty is a single sheet with printing on both sides of the sheet or where the warranty is comprised of more than one sheet, the page on which the warranty text begins; (2) Where the

warranty is included as part of a larger document, such as a use and care manual, the page in such document on which the warranty text begins.” 16 C.F.R. § 701.1. Obviously, the receipt in this case was not a warranty, under this definition, which contemplates the required terms on the “face” of either a “single sheet” or on the “face” of a “larger document.”

Just as federal law expressly permits “original purchaser” limited warranties,¹¹ which were the only subject of plaintiffs’ suit and the interlocutory appeal, federal law does not consider documents provided to the consumer at the point-of-sale which reference, but do not contain the warranty terms, to be warranties themselves.¹²

Indeed, courts have expressly held that a consumer sales receipt is not a “warranty” as that term is defined under Magnuson-Moss. Thomas v. Micro Ctr., 172 Ohio App. 3d 381, 875 N.E.2d 108, 112 (2007) (“The only evidence of a written warranty consists of the Toshiba warranty and the TechSaver extended warranty. Micro Center did state its return policy on the receipt that it printed at the time of the transaction. That policy, however, is not required by law and does not constitute a written warranty for purposes of the act.”); see also Home Depot U.S.A., Inc. v. Miller, 268 Ga. App. 742, 744, 603 S.E.2d, 82 80 (2004) (information printed on

¹¹ See 16 C.F.R. § 239.4 (“Example B: (In an advertisement mentioning a lifetime guarantee on a battery where the duration of the warranty is for as long as the original purchaser owns the car in which it was installed) ‘Our battery is backed by our lifetime guarantee. Good for as long as you own the car!’”); 16 C.F.R. § 700.6 (“Thus, these provisions do not preclude the offering of a full warranty with its duration determined exclusively by the period during which the first purchaser owns the product, or uses it in conjunction with another product. For example, an automotive battery or muffler warranty may be designated as ‘full warranty for as long as you own your car.’”); 40 C.F.R. § 85.2102 (“Owner means the original purchaser or any subsequent purchaser of a vehicle.”).

¹² See 40 CFR § 85.2102(a)(12)(“Warranty Booklet means a booklet, separate from the owner's manual, containing all warranties provided with the vehicle.”); see also Kelley v. Microsoft Corp., 2007 WL 2600841 (W.D. Wash.)(sticker on personal computers referencing them as “Windows Vista Compatible” did not constitute a warranty under 15 U.S.C. § 2301).

sales receipt “10 yr. warranty” was not warranty as court held “it is impossible to determine who issued the warranty, what sort of defects are covered by warranty, what remedies or repairs are promised and whether the warranty has been breached. In fact, it appears from the evidence-i.e., Crystal Cabinets’ attempted repairs-that any warranty was a Crystal Cabinets manufacturer’s warranty, not a Home Depot seller’s warranty”); NEC Technologies, Inc. v. Nelson, 267 Ga. 390, 478 S.E.2d 769 (1996) (sales receipt with notation regarding “six-year warranty” was not a warranty for purposes of breach of warranty claim). A receipt is a receipt; a warranty is a warranty; and a receipt referencing a warranty is not a warranty.

In addition to the foregoing authorities, the Seventh Circuit made clear that Magnuson-Moss only applies to a written “warranty” as that term is defined in the Act in Skelton v. General Motors Corp., 660 F.2d 311 (7th Cir. 1981). In that case, consumers of GM vehicles instituted a class action claiming that the undisclosed substitution of automobile transmissions by GM constituted breach of express and implied warranties and thus provided a cause of action under Magnuson-Moss. Rather than basing their cause of action on the terms of the actual express warranties provided, the consumers of GM vehicles, as in this case, argued that other documents they were provided could form the basis for a claim under Magnuson-Moss.

Specifically, the consumers contended that “GM, through its ‘brochures, manuals, consumer advertising and other forms of communications to the public generally and to members of plaintiffs’ class specifically,’ warranted and represented that 1976 through 1979 GM automobiles contained THM 350 (M38) transmissions, or ‘transmissions of similar quality and performance.... and that (such transmissions) would meet a specified level of performance.’ Plaintiffs charge in Count I that, contrary to these warranties and representations, GM substituted inferior THM 200 (M29) transmissions for THM 350 (M38) transmissions in GM automobiles

manufactured from 1976 through 1979. This undisclosed substitution is alleged to constitute a violation of written and implied warranties under § 110(d) of Magnuson-Moss. In Count II, plaintiffs claim that the substitution is actionable as a ‘deceptive warranty’ under s 110(c)(2) of the Act, 15 U.S.C. s 2310(c)(2) (1976).” Id. at 312-13.

The Seventh Circuit firmly rejected this argument, holding that Congress intended only that the actual “warranties” not other documents, such as brochures, manuals, consumer advertising, and other forms of communication, form the basis for a cause of action under Magnuson-Moss:

Therefore, in arguing that s 110(d) provides consumers with a claim actionable in federal court for breach of any written express warranty, plaintiffs argue for a construction of § 110(d) that was not contemplated by either the House or the Senate. It is inconceivable that, by deleting any reference to “express warranty” from the Act, and by providing instead a cause of action for breach of “written warranty” (which the Conference Committee had newly defined in § 101(6)), the Committee could have meant to create a private remedy actionable in federal court for breach of all written express warranties, when neither the Senate nor the House had so provided. . . .

The text of a “written warranty” must, in the nature of things, be written on something. And, to this extent, a written warranty as defined in § 101(6) might be described as a written document. *But there is nothing in the scheme of the statute to suggest that the Act was intended to apply to any promises, affirmations or undertakings other than those defined as written warranties in § 101(6). And we ought not to take a leap of faith to a documentary definition allegedly suggested by the seemingly inapt phrasing of § 102. As already noted, it is apparent from the statutory scheme that “written warranty” should be accorded a single, precise meaning. Moreover, we are constrained by sensible rules of statutory construction to interpret the phrase “written warranty” in s 102, as in the other sections of the statute, to be consistent with the clear meaning given to it by § 101(6).*

Id. at 319-20 (emphasis supplied and footnote omitted).

Just as the Seventh Circuit correctly held that brochures, manuals, consumer advertising, and other forms of communication are not a “written warranty” under Magnuson-Moss where the seller has a “written warranty,” the receipt provided in this case was not a “written warranty” where it referred Mr. McMahon to the “written warranty” on Advance’s website which fully complies with Magnuson-Moss.

Neither the plaintiffs nor the Circuit Court offered any statutory references, regulatory references, or case law. Plaintiffs and the Circuit Court merely referenced an opinion by a sole dissenter in McMahon I, App. at 24, but no one, not plaintiffs, not defendants, not the Circuit Court ever mentioned Magnuson-Moss at any time during this litigation and the opinion by the sole dissenter was without benefit of any pleading, briefing, or argument.

Consequently, because a receipt is not a warranty under Magnuson-Moss and Advance’s written warranty fully complied with the requirements under Magnuson-Moss, Plaintiff John’s Magnuson-Moss claim in the third amended complaint should have been dismissed.

4. Because Plaintiff John Has No State Law Written Express Warranty Claim, She Has No Claim under Magnuson-Moss.

The Circuit Court concluded in a footnote that “this argument is rendered moot by [the Circuit Court’s] finding, *supra*, that the Plaintiffs can proceed on the basis of express warranty and/or the implied warranty of merchantability.” App. at 17. The Circuit Court is simply wrong.

“The [Magnuson-Moss] Act applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes.” 16 C.F.R. 700.1(a). The Act does not alter or re-write the substantive warranty laws of the states; importantly, “[t]he substantive elements are the same under [state law] and Magnuson-Moss Act. . . Under both, the court applies state warranty law.” Birdsong v. Apple, Inc., 590 F.3d 955, 958 n.2 (9th Cir. 2009).

While Magnuson-Moss provides a federal claim for relief based upon certain state warranty claims, Monticello v. Winnebago Indus. Inc., 369 F. Supp. 2d 1350, 1356 (N.D. Ga. 2005), it does not expand consumers' rights with respect to such claims, and dismissal of the underlying state law warranty claims requires the same disposition with respect to an associated Magnuson-Moss claim. See *id.*, see also Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008) (“disposition of the state law warranty claims determines the disposition of the Magnuson-Moss Act claims.”); Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 833, 51 Cal. Rptr. 3d 118 (2006) (“the trial court correctly concluded that failure to state a warranty claim under state law necessarily constituted a failure to state a claim under Magnuson-Moss.”).

As one court noted, “As for the cause of action in 15 U.S.C. § 2310(d)(1), Congress created a federal cause of action for breach of a *written* warranty that essentially duplicates a state law warranty claim.” Baldwin v. Jarrett Bay Yacht Sales, LLC, 683 F. Supp. 2d 385, 391 (E.D.N.C. 2009) (citations omitted) (emphasis added); see also Brown v. Cincyautos, Inc., 2009 WL 2913936 at *6 (S.D. Ohio) (“The elements of a violation of the Magnuson Moss Act are the same as for a breach of warranty. Abele v. Bayliner Marine Corp., 11 F. Supp. 2d 955, 961 (N.D. Ohio, 1997). In fact, *‘the applicability of the Magnuson-Moss Act is directly dependant upon a sustainable claim for breach of warranty.’* Temple v. Fleetwood Enters., Inc., 133 Fed. Appx. 254, 268 (6th Cir. 2003) citing LaBonte v. Ford Motor Co., 1999 Ohio App. LEXIS 4795, 1999 WL 809808, No. 74855, at *7 (Ohio Ct. App. Oct. 7, 1999)(emphasis supplied).

Again, the term “warranty” is defined under Magnuson-Moss as “any *written* affirmation of fact or *written* promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises

that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time” or “any undertaking in *writing* in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.” 15 U.S.C. § 2301(6) (emphasis added). Thus, where a consumer has no state law claim for breach of written express warranty, as in this case, the consumer has no federal law claim under Magnuson-Moss.

Here, Advance has prevailed, as a matter of state law, on plaintiffs’ express warranty and related claims; therefore Ms. John cannot, as a matter of federal law, prevail upon a Magnuson-Moss claim which provides no independent cause of action. Accordingly, Ms. John’s Magnuson-Moss claim in the third amended complaint should have been dismissed.

VI. CONCLUSION

Because the Circuit Court has ignored this Court’s rulings regarding expiration of the express warranty in this case and the extinguishment of the related causes of action, defendants request that this Court issue a writ of prohibition in this matter prohibiting the Circuit Court from enforcing its order of April 5, 2012, and awarding such other relief as the Court deems appropriate.

**ADVANCE STORES COMPANY,
INCORPORATED, d/b/a Advance Auto Parts,
and DONN FREE**

By Counsel



Andrew G. Ramey, Esq. (WVSB # 3013)
Hannah Curry Ramey, Esq. (WVSB # 7700)
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Telephone (304) 526-8133

Karen E. Kahle, Esq. (WVSB # 5582)
Steptoe & Johnson PLLC
P.O. Box 751
Wheeling, WV 26003
Telephone (304) 231-0441

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

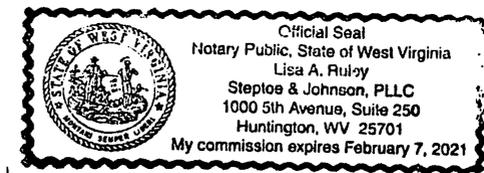
Ancil G. Ramey, being duly sworn, on his oath deposes and says that the facts and allegations contained within the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION are true upon my best information and belief.

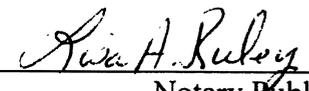


Ancil G. Ramey

Subscribed and sworn to before me this 18th day of June, 2012.

My Commission expires: February 7, 2021





Notary Public

**MEMORANDUM LISTING THE NAMES AND ADDRESSES OF THOSE PERSONS
UPON WHOM THE RULE TO SHOW CAUSE IS TO BE SERVED, IF GRANTED**

1. The Honorable Arthur M. Recht
1st Judicial Circuit
Ohio County Courthouse
1500 Chapline Street
City/County Building
Wheeling, WV 26003
Respondent Judge

2. Joseph J. John, Esq.
John Law Offices
80 12th Street, Suite 200
Wheeling, WV 26003-3273
Counsel for Respondents/Plaintiffs Below

3. Anthony I. Werner, Esq.
Bachmann Hess Bachmann & Garden
P.O. Box 351
Wheeling, WV 26003
Counsel for Respondents/Plaintiffs Below

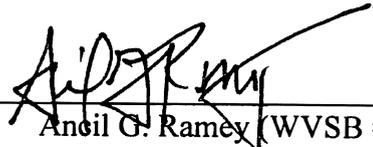
CERTIFICATE OF SERVICE

I hereby certify that June 18, 2012, I served the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION upon counsel of record by electronic mail and by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

The Honorable Arthur M. Recht
1st Judicial Circuit
Ohio County Courthouse
1500 Chapline Street
City/County Building
Wheeling, WV 26003

Joseph J. John, Esq.
John Law Offices
80 12th Street, Suite 200
Wheeling, WV 26003-3273
Counsel for Plaintiffs

Anthony I. Werner, Esq.
Bachmann Hess Bachmann & Garden
P.O. Box 351
Wheeling, WV 26003
Counsel for Plaintiffs



Ancil G. Ramey (WVSB # 3013)